Supreme Court, U.S.
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No. 00-1035

In the

Supreme Court of the United States

LEONARD MINZER and HARRY SCHIPPER, on behalf of themselves and all others similarly situated,

Petitioners,

v.

GERALD C. KEEGAN, PHILIP F. RUPPEL, GEORGE H. SORTER, GWENDOLYN CALVERT BAKER, WILLIAM F. DE NEERGAARD, JAMES G. PEEL, C. STEPHEN CONNOLLY, WILLIAM F. WARD, NICHOLAS A. MARSHALL, PETER C. HAEFFNER, JR., GREATER NEW YORK SAVINGS BANK, ASTORIA FINANCIAL CORP., ASTORIA FEDERAL SAVINGS AND LOAN ASSOCIATION, and ASTORIA FEDERAL SAVINGS & LOAN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

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In their opposition brief, respondents introduce a new and unfounded legal characterization of the facts underlying this litigation to which we must respond.

This case is about The Greater New York Savings Bank's ("The Greater") material misrepresentations and omissions in a proxy statement seeking - and procuring - shareholder approval for the merger between it and Astoria Financial Corporation ("Astoria"). It is not about petitioners' (or any other shareholders') pursuit of a better and higher offer from North Fork Bancorporation, Inc. ("North Fork"). Petitioners claim that The Greater's shareholders were misinformed by a materially false and misleading proxy statement, and seek redress for this violation of Section 14(a) of the Securities Exchange Act of 1934 and Rule 14a-9 promulgated thereunder. The prayer for relief expressly seeks, in plain English, a declaration that defendants violated Section 14(a), a grant of rescission, other appropriate equitable relief, and monetary damages, among other things (Petition 78a-79a).

The thrust of this Petition is that the Second Circuit's decision flies in the face of *Mills v. Electric-Auto-Lite Co.*, 396 U.S. 375 (1970), and seriously undermines Section 14(a)'s guarantee of fair corporate suffrage by freeing corporations and their officers and directors from explaining to their shareholders the true nature of the questions for which the shareholders' vote is sought in a wide range of merger and acquisition transactions. The decision disrupts what had been a settled body of law after *Mills*.

Recognizing that there is no basis upon which to distinguish this case from *Mills*, it is not surprising that respondents make no effort to justify the novel reasoning relied upon by the Second Circuit – *i.e.*, that causation is lacking because the Second Circuit believed that shareholders would have voted the same even had the truth been told. 218 F.3d at 145. Instead, respondents now resort to a completely different

tack and invoke the entirely distinct and inapposite doctrine of "loss causation." They say that "[h]ere, unlike *Mills*, the injury complained of is not the approval of the challenged merger itself. Rather, petitioners complain of the 'loss' of the speculative possibility of a more beneficial merger opportunity with North Fork...." Opposition Brief at 10. They argue that this loss is too speculative to be the basis for an award of damages, and thus that the case should be dismissed on the pleadings.[1]

Respondents have mischaracterized petitioners' claims. Petitioners *do* challenge the approval of the merger by The Greater's shareholders: nothing more, nothing less. Petitioners' complaint seeks whatever relief, equitable or otherwise, is appropriate in light of the denial of the fair corporate suffrage accomplished through defendants' violations of the proxy rules. As *Mills* makes clear, that relief may include, but is not limited to, monetary damages. 396 U.S. at 386.

With respect to damages, petitioners have never insisted on or limited their claim to an amount of money damages calculated solely by reference to the foregone opportunity presented by North Fork.[2] Fully consistent with the doctrine of

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[1] In support of this argument, respondents *allege* the "counter-fact," among others, that North Fork itself voted for the Astoria merger. This type of reverse pleading undermines the very refrain upon which respondents seek to rely – courts may not accept as true anything but the well pleaded facts contained in the complaint. No allegation concerning the voting of North Fork's shares is made in the complaint here and, therefore, was not relied upon or even mentioned in the Second Circuit's opinion. Moreover, discovery showed that North Fork's approval of the merger was ministerially and inadvertently granted, and that, had the proxy been shown to North Fork's chairman, he would have voted against the merger. Accordingly, it is improper to consider North Fork's merger vote in determining the merit of this appeal.

[2] Damages could, for example, be calculated simply by reference to a "fair" value above that offered by Astoria, on which North Fork's interest would be probative.

loss causation, petitioners only seek compensation for losses that flow directly from the misrepresentation – here, the approval of the merger with Astoria for less than fair value. If a measure of damages is eventually considered that takes into account North Fork's offer as a measure of fair value, respondents will have the opportunity to argue their point about the power of The Greater's management to ignore it. But to cut short the consideration of any remedy based on an argument about the causal nexus between petitioners' claim and one possible way of computing damages is wrong. *Mills* says that a case like this should move forward, not be terminated, once there is a showing of a material misrepresentation in the proxy statement. No case cited by respondents suggests otherwise. At this stage, petitioners ask simply for the ability to show the violation and seek whatever relief is appropriate.

Respondents also briefly argue lack of materiality – the issue the Second Circuit expressly declined to reach because of its erroneous holding on causation. As stated in our Petition, the misstatements and omissions in the proxy statement are material. Whatever the attitude of The Greater's management toward North Fork, shareholders would likely have considered significant the complete truth regarding North Fork's willingness to offer more than Astoria because that goes directly to the question of the value of The Greater and, hence, whether the proposed inferior merger was worth voting for. *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), a case in which this Court expanded the scope of materiality under the securities laws, says nothing that could be read to suggest an absence of materiality here. The Greater obviously saw North Fork's overture as significant enough to its shareholders to describe in the proxy statement. Their legal obligation was to describe it accurately, which they did not do. As suggested in the Petition, however, this issue should be resolved by the court of appeals and need not be considered by this Court. Petition at 10-11

n.6.[3]

For the foregoing reasons and the reasons stated in the Petition, the writ of certiorari should be granted.

Dated: February 5, 2001

Respectfully submitted,
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[3] Respondents improperly push aside petitioners' claim of causation predicated on the loss of shareholders' state court right to appraisal on the ground that there is no allegation in the complaint that any shareholder forewent appraisal rights. Opposition Brief at 12 n.6. However, as respondents plainly concede by not citing to any authority in support of this argument, there is no requirement to plead causation of the loss of a state remedy in the complaint.

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